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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

JOSEPH PETTINEO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Can the government be estopped from enforcing a right because of affirmative misconduct by its agents?

2. If so, what standards apply to the estoppel determination?

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JOSEPH PETTINEO,
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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Joseph Pettineo respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 1, 1983.

OPINION BELOW

The judgment order of the Court of Appeals, not yet reported, is set forth herein as an Appendix. Neither of the courts below filed an opinion.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 1, 1983. This petition for

certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Can the United States be stopped from enforcing a statutory right because of affirmative misconduct of its agents?

2. If so, what standards apply to the determination whether the government should be estopped?

STATEMENT OF THE CASE

In December, 1974, petitioner sought legal advice from an attorney named Frank Paglianite. While purporting to act as petitioner's attorney and advisor, Paglianite lured petitioner into a calculated fraud scheme, which eventually cost petitioner and members of his family many thousands of dollars. [App. 531a][1] Paglianite convinced petitioner to invest money in Kanek Tool Corporation by advising him that Kanek was entitled to tax write-offs which could be passed along to petitioner's own businesses, Super Quality Oil Company and Custom Oil Company. [App. 82a] Paglianite represented that Kanek was solvent and owned substantial assets, although he knew that the company was in serious financial trouble, with essentially all its "assets" either pledged as collateral for loans already in default, or actually owned by third persons and merely leased to Kanek, and was further in debt to other unsecured creditors.

At the time, Kanek was owned by a man named Kelly. The district court, during trial, referred to Kelly and Paglianite as, "two of the biggest crooks in the Jersey scene in a long time." [App. 115a] With Paglianite's

1. References to the record are cited to the Appendix filed in the Court of Appeals.

help. Kelly "sold" Kanek to another group of investors around the same time he "sold" it to petitioner and Paglianite. [App. 73a-76a] and while under an injunction forbidding sale. [App. 90a-93a] For several months, Paglianite actually ran Kanek, keeping the corporate books and checkbooks in his briefcase or his law office. During that time, he repeatedly obtained substantial additional sums of money from petitioner or members of his family, ostensibly to pay corporate obligations, including payroll taxes. [App. 442a] Most of the money advanced by petitioner (including the tax money) was not used for the stated purposes, however, but was converted by Paglianite, dragging Kanek further into debt.

Meanwhile, the government was investigating the fraudulent activities of Kelly and Paglianite. A contract agent, working undercover for both the IRS and the FBI, Charles Coveney, worked inside Kanek as assistant/spy to Kelly during mid-1974, and to Paglianite beginning in December, 1974. [App. 68a-82a] He was actively involved in the multiple "sales" of Kanek. He advised petitioner that he thought Kanek was a viable company, although he was well aware of its insolvency. [App. 109a] He was also aware, indeed he was investigating for the government, the fraud being perpetrated upon petitioner. He reported the details of the fraud, as it progressed, to both the FBI and the IRS [App. 86a-87a, 120a], but he concealed the truth from petitioner to protect the "cover" of his investigation. [App. 159a-160a] Kelly, too, became a government informant [App. 159a] but the record is unclear whether he was acting in that capacity when he participated in the initial fraud on petitioner. [App. 118a][2] Petitioner was frustrated in his efforts to develop the full extent of the government's involvement in the fraud because the district court

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2. It appears that at some point Paglianite also became an informant for the government. United States v. Costanzo, 625 F.2d 465 (3d Cir. 1980).

excluded the testimony as irrelevant [App. 117a] and because the government, notwithstanding a pending Freedom of Information Act[3] request by petitioner, destroyed its investigative file.

When, several months after investing in Kanek, petitioner realized he was being swindled by his own supposed lawyer and business partner, he asserted control and obtained custody of the corporate books. At that time he discovered that payroll tax returns had not been filed for the first two quarters of 1975, and he immediately caused the returns to be filed. Since the company was insolvent, however, the taxes were not paid, and petitioner and the IRS began a civil dispute over whether petitioner should be held personally liable for the unpaid taxes converted by Paglianite. In 1979 and 1980, the IRS withheld tax refunds due petitioner, and applied them as a credit to Kanek's unpaid payroll taxes. Petitioner brought suit for the refund, invoking the jurisdiction of the district court under 28 U.S.C. §1346(a)(1), and the government counterclaimed for the remaining balance of the payroll tax assessment. Paglianite was added by the government as a third party defendant but he could not be located and was never served. Petitioner's estoppel claim was rejected by the district court, and the government obtained a judgment holding petitioner responsible for the taxes.

REASONS FOR GRANTING THE WRIT

There is a division of authority among the courts of appeals.

The various courts of appeals which have dealt with the question of estoppel against the government have approached the issue from such divergent viewpoints that it is inaccurate to state that there is a bright line

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3. 5 U.S.C. §552.

"conflict" of decisions. Rather, there is such diversity even among panels of the same circuit, that the only accurate characterization is that of conceptual disarray.

In his dissent to *Schweiker v. Hansen*, 450 U.S. 785 (1981), Mr. Justice Marshall noted that the law in this area was "far from settled" and that the lower courts were without adequate guidance. *Id.* at 792. Since the decision in *Hansen*, a number of courts of appeals have commented upon the obscurity of the law of government estoppel. *See, e.g., Community Health Services of Crawford County, Inc., v. Califano*, 698 F.2d 615, 620 (3d Cir. 1983) ("As we seek to ascertain and reconcile the rationales proferred for application or rejection of the estoppel doctrine in a broad variety of cases involving the government, like Justice Marshall, we find this issue far from settled."); *Rogers v. Tennessee Valley Authority*, 692 F.2d 35, 37 (6th Cir. 1982) ("The viability and scope of this rule, and the subsidiary questions of whether 'affirmative misconduct' is required or whether the rule may be applied only to the proprietary, rather than the sovereign, functions of the government, have engendered a conflict of authority among the federal courts."); *Home Savings & Loan Association of Lawton, Oklahoma v. Nimmo*, 695 F.2d 1251, 1255 (10th Cir. 1982) (McKay, J., dissenting) ("[T]he question of when the government may be equitably estopped has been the subject of 'considerable ferment,' dividing panels and generating inconsistencies throughout the courts of appeals."); *Akbarin v. Immigration & Naturalization Service*, 669 F.2d 839, 842-43 (1st Cir. 1982) ("[T]he state of the doctrine of estoppel against the Government is difficult to determine." "[The courts have made] unproductive efforts to define 'affirmative misconduct . . . ' "). *See also, General Accounting Office v. General Accounting Office Personnel Appeals Board*, 698 F.2d 516, 526 n.57 (D.C. Cir. 1983).

Indeed, a review of the circuit decisions since *Hansen* manifests the accuracy of these comments. Most

courts have required a showing of affirmative misconduct by an agent of the government,[4] while others have allowed estoppel because of an agent's mistake of law of fact,[5] while still others have questioned whether even affirmative misconduct will give rise to an estoppel.[6] Moreover, even those courts which purport to apply the affirmative misconduct standard have used inconsistent yardsticks for measuring that element.

The history of *Immigration & Naturalization Service v. Miranda*, 103 S.Ct. 281 (1982), graphically illustrates the confusion over the proper definition of "affirmative misconduct." There, government delay in acting upon a visa application was deemed sufficient to estop the government from denying the application based upon a change of circumstances during the interval of delay. *Miranda v. Immigration & Naturalization Service*, 638 F.2d 83 (9th Cir. 1980) This Court granted certiorari and remanded for reconsideration in light of *Hansen*. The circuit adhered to the prior decision on remand, finding affirmative misconduct in the government delay. *Miranda v. Immigration & Naturalization Service*, 673 F.2d 1105 (9th Cir. 1982). This Court again granted certiorari and summarily reversed, finding no misconduct. Meanwhile, the Fifth Circuit in *Dong Sik Kwon v. Immigration & Naturalization Service*, 646 F.2d 909 (5th Cir. 1981) rejected a similar claim, finding no misconduct in bureaucratic delay in acting on a visa request.

Bureaucratic delay of another sort, coupled with the agency's preliminary disregard of its own procedures

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4. See, e.g., United States v. Harvey, 661 F.2d 767 (9th Cir. 1981).

5. Portmann v. United States, 674 F.2d 1155 (7th Cir. 1982); Broad Ave. Laundry & Tailoring v. United States, 681 F.2d 746 (Ct.Cl. 1982); Best v. Stetson, 691 F.2d 42 (1st Cir. 1982).

6. New Jersey v. Department of Health & Human Services, 670 F.2d 1284, 1296-97n.17 (3d Cir. 1982); Deltona Corp. v. Alexander, 682 F.2d 888, 891 (11th Cir. 1982); National Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir. 1981).

was sufficient to work an estoppel in *Meister Bros., Inc. v. Macy*, 674 F.2d 1174 (7th Cir. 1982). Plaintiff's property, insured by the government under the National Flood Insurance Act,[7] was severely damaged in a flood. A notice of loss was filed and a government agent was assigned to investigate the amount of damage and negotiate the amount to be paid under the claim. He failed to supply plaintiffs with a formal proof of loss form until three months after it was due, but the agency ignored the procedural requirement until negotiations broke down and litigation ensued. Without discussing affirmative misconduct, and specifically refusing to articulate any general standard, the court found an estoppel based upon "the unique circumstances of this case." *Id.* at 1177.

In *Urban Data Systems, Inc. v. United States*, 699 F.2d 1147 (Fed. Cir. 1983), a government agent entered into a prohibited "cost plus percentage of cost" contract for the purchase of goods, which goods were subsequently delivered. Finding no affirmative misconduct on the part of the agent who entered into the unlawful contract, the Federal Circuit refused to estop the government from renouncing the illegal price terms. On the other hand, in *Broad Avenue Laundry & Tailoring v. United States*, 681 F.2d 746 (Ct. Cl. 1982), an agent agreed to increasing the price term of a government contract because of a mistake of law as to the effect of new prevailing wage standards announced by the Department of Labor. In reliance upon the price increase, the contractor agreed to pay the higher wages to his employees for the services performed for the government. By the time the Staff Advocate General issued an opinion clarifying the regulation involved, the term of the contract had nearly ended, and the higher prevailing wages had been paid. Construing *Hansen* to "recognize . . . that in cases other than [the] classic situation, estoppel

7. 42 U.S.C. §4001 *et seq.*

by an agent's blunders is not impossible,"[8] the court did not discuss affirmative misconduct, but looked to 1) whether the agent's action was within the scope of her jurisdiction, 2) whether her commitment was "palpably illegal" and 3) the government's duty to cooperate and act in good faith. The government was estopped from renouncing the increased price.

Similarly, in *Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982), a postal clerk, misconstruing an obscure Postal Service regulation, erroneously told plaintiff that she could insure artwork negatives up to their full value of $3,000. She purchased the insurance, and mailed the negatives. When they were lost, the government attempted to limit her recovery to $500, the maximum coverage for merchandise. Summary judgment in favor of the government was reversed, and the case remanded to the district court for a hearing on the estoppel claim. Although the court identified affirmative misconduct as a necessary element of government estoppel, it did not explain how the postal clerk's mistake fell into that category.

A sharply divided panel of the Third Circuit also found a government agent's assurances based upon his misinterpretation of a regulation sufficient to estop the government in *Community Health Services of Crawford County, Inc. v. Califano, supra*. There, Travelers Insurance Company was acting as the agent for the Department of Health and Human Services in processing claims and payments under the Medicare program. Plaintiff, a health care provider under contract with HHS, sought advice whether grant money received under the CETA[9] program would be set off against its Medicare reimbursements. Assured on several occasions by Travelers that it would not, plaintiff used the extra

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8. *Id.* at 748.

9. Comprehensive Employment and Training Act of 1973, 29 U.S.C. §801 *et seq.*

money to provide expanded benefits. The court found affirmative misconduct in Travelers' making assurances based upon its own interpretation of the regulation rather than seeking a prompt accurate answer from HHS. Thus the agency was estopped from enforcing an otherwise valid and applicable regulation.

In *Best v. Stetson*, 691 F.2d 42 (1st Cir. 1982), a civilian employee of the Air Force was misinformed by a personnel officer that he had been removed from "excepted service" status when he became eligible for appointment to the competitive civil service. He thus failed to take appropriate measures to effectuate the desired change in status. Later, he was laid off without the various benefits for which he would have been eligible had he, in fact, been in the competitive service. Without discussing the affirmative misconduct standard, the court found that plaintiff's version of the facts would establish an estoppel claim. Summary judgment for the government was reversed, and the case remanded for a hearing.

Government employees in other circuits have fared less well. In *Chu v. Schweiker*, 690 F.2d 330 (2d Cir. 1982), plaintiffs were medical residents given letters of appointment for a fixed term of years to a Public Health Service hospital. When the hospital was ordered closed in a spending cutback, the government revoked the employment contracts. Finding no affirmative misconduct, the Second Circuit rejected plaintiffs' estoppel claims. Similarly, in *National Treasury Employees Union v. Reagan*, 663 F.2d 239 (D.C. Cir. 1981) plaintiffs' federal appointments were revoked because of an administrative hiring freeze which went into effect before plaintiffs reported for work. The District of Columbia Circuit rejected the estoppel claim, finding no affirmative misconduct.

Oral misinformation by an agent of the Immigration and Naturalization Service which caused the plaintiff alien to begin working without first obtaining a work

permit — an action fatal to his student visa — was sufficient to give life to an estoppel claim in *Akbarin v. Immigration & Naturalization Service, supra.* After noting that the doctrine of affirmative misconduct had led to "unproductive efforts" by the courts of appeals to define the term, the court passed over that requirement to develop a three part test: 1) was there an error by the government? 2) could the government action reasonably have been intended to induce reliance? and 3) did the government misconduct induce the other party to act in a way that he would not otherwise have acted?

However, oral misinformation by the Internal Revenue Service led to a contrary result in *Drucker v. Commissioner of Internal Revenue*, 697 F.2d 46 (2d Cir. 1982). There, the plaintiffs claimed they had relied upon assurances by an IRS agent that the commissioner would waive the time requirements for their filing an amended tax return because of pending litigation over the validity of the parties' prior return. They were later precluded from untimely filing the amended return. With little discussion, the court held that the alleged misstatements, even if proven, would "be a long way" from meeting *Hansen's* standard for estoppel.

Standards of "serious injustice to the plaintiff" and "no undue damage to the government" were held sufficient to estop the government from reincarcerating a mistakenly paroled prisoner, who had been serving a sentence under a statute which prohibited parole, in *Johnson v. Williford*, 682 F.2d 868 (9th Cir. 1982). But in *Bormey v. Schweiker*, 695 F.2d 164 (5th Cir. 1983), administrative actions taken because of "bona fide factual errors" and not "for any invideous reason" were held insufficient to estop the government regardless of the prejudice to the party affected by the improper action.

Finally, in *Home Savings & Loan Association of Lawton, Oklahoma v. Nimmo, supra.*, the case presenting the closest fact pattern to those presented here, the Tenth Circuit estopped the Veterans Administration

from asserting statutory defenses to its guarantee of a home mortgage because it had failed to disclose to the lender's assignee (Home Savings & Loan) its suspicion that one of the borrowers' signatures on the mortgage was a forgery. Although the court does not discuss the element of affirmative misconduct, implicit in the court's analysis is the notion that it is improper for the government to sit silent, knowing one of its citizens is being harmed by the fraud of a third party, and then step in and reap benefits from the fraud, and from its own nondisclosure.

An even clearer case is presented here. The government not only failed to disclose the fraud of Kelly and Paglianite, it directly participated in the fraud through its agent, Coveney. Coveney helped lure petitioner into Paglianite's trap by misrepresenting the viability of Kanek Tool, and he actively concealed the true state of affairs in order to protect his investigation. Later, the IRS destroyed its investigative file when petitioner sought by filing a FOIA request to uncover the government's role in his victimization. As a direct result of the government's wrongful concealment of and participation in the fraud, petitioner was caused to assume an ownership interest in Kanek, and was prevented from discovering that money he was advancing for tax payments was not being used for that purpose, but instead was being converted by Paglianite. The government's unconscionable attempt to collect those unpaid taxes now from petitioner, and petitioner's estoppel defense, squarely presents the issue not reached in *Hansen* and *Miranda* whether the government can be estopped by the affirmative misconduct of its agents.

It goes without saying that the honesty, or lack thereof, with which the government deals with its citizens is a matter of the greatest importance. The frequency with which all citizens deal with our government mandates some uniform groundrules setting forth at least minimum limitations upon the government's

ability to avoid the usual consequences of breaking promises, making misrepresentations, and otherwise acting in bad faith. At present, the circuits are decrying their lack of guidance and, left to their own devices, have created a legal patchwork that requires the government to act with honor in California but allows it to act with duplicity in New York.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

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APPENDIX:
JUDGMENT ORDER OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-5480 and 82-5613

JOSEPH PETTINEO,

Appellant

v.

THE UNITED STATES OF AMERICA

Frank A. Paglianite,
Defendant on the Counterclaim

On Appeal from the United States District Court
for the District of New Jersey
(C. A. No. 81-2671)

Argued May 12, 1983

Before: ADAMS and WEIS, *Circuit Judges*, and
VanARTSDALEN, *District Judge**

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* Honorable Donald W. VanArtsdalen, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After considering all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs to be taxed against appellant.

BY THE COURT,

WEIS

Circuit Judge

ATTEST:

SALLY MRVOS

Sally Mrvos, Clerk

DATED: June 1, 1983